Georgia Code:

Ga. Code § 34-1506 (App. "B") 9, 22, 37
Ga. Code § 34-1514 (App. "B") 22, 37
Ga. Code § 40-1801, as amended 12
Ga. Code § 47-106 14

Other:

Me. Const. art. 5, § 3 15
Miss Const. art. V, §§ 140-141 14
R. I. Const. Amend. 11, § 3 15
Vt. Const. ch. 2, § 39 14
Bryce, The American Commonwealth, Vol. 1 at 353 (rev. ed. N. Y. 1911) 20
Cobb, Digest, p. 1118 11
Dawson, Compilation of Georgia Laws, p. 116 11
Ga. H. R. Jour. J. S. Res. 3, 36-38 (1947) 11

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 800.

BEN W. FORTSON as Secretary of State of the State of Georgia, and His Successor in Such Office, as Such,
Appellant,

v.

JOHN MORRIS, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.

JURISDICTIONAL STATEMENT AND APPELLANT'S BRIEF ON THE MERITS.

JURISDICTIONAL STATEMENT.

On November 17, 1966, the United States District Court for the Northern District of Georgia entered an order declaring unconstitutional and void that portion of the Constitution of Georgia of 1945 which authorizes the election of the Governor of Georgia by the General Assembly where no candidate has received a majority of the votes cast in the General Election for this office, Ga. Const., Art. V, Sec. I, Par. IV (Ga. Code Ann. § 2-3004).

In its order, the District Court enjoined the Secretary of State (Appellant) from seeking to cause the election of a governor by the General Assembly.

This is an appeal from that order and judgment. This Jurisdictional Statement is submitted to show that the Supreme Court has jurisdiction of this appeal and that substantial questions are presented.

OPINION BELOW.

The November 17, 1966, opinion and order of the District Court, which are not yet reported, are reproduced as Appendix "A" (pp. 27-33) hereto. See also Tr. 226, 233.

JURISDICTION.

The District Court's order of November 17, 1966, was entered in two suits.

The first action, John Morris *et al.* v. Ben W. Fortson, Civil No. 10533, was filed on November 9, 1966. It alleged jurisdiction as follows:

> This action arises under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, and Title 42, §§ 1981 and 1983 of the United States Code. Jurisdiction is conferred on this Court by §§ 1331, 1343 (3) (4), 2201, 2281, and 2283 of Title 28, United States Code and §§ 1981, 1983, and 1988 of Title 42, United States Code. (Tr. 90, Complaint, *Id.* at par. I.)

The plaintiffs in the first suit prayed, *inter alia,* for a three-judge court and for an injunction preventing the General Assembly from electing a governor pursuant to the Georgia Constitution until such time as representation in the General Assembly shall be based solely on population (which has been ordered to occur by 1969). For the history of Georgia General Assembly reapportionment litigation, see *Toombs v. Fortson,* 205 F. Supp. 248 (N. D. Ga. 1962); *Fortson v. Toombs,* 379 U. S. 621 (1965);

Toombs v. Fortson, 384 U. S. 210 (1966), *affirming* 241 F. Supp. 65 (N. D. Ga. 1965). On November 9, 1966, a three-judge court was designated (Tr. 102).

The second action, Larry G. Justice *et al.* v. Ben W. Fortson, Jr., Civil No. 10546, was filed on November 10, 1966. It alleged jurisdiction in part as follows:

> This action is brought to redress deprivation of rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States . . . This cause of action is authorized to be brought by 42 USC, Section 1983. Jurisdiction upon this Court is conferred by 28 USC, Sections 1343 (3) (4), 1331, 2201, 2281 and 2283, and 42 USC, Section 1988 . . . This action is required to be heard and determined by a court of three judges persuant to 28 USC, Section 2281 et seq. (Tr. 106, Complaint, *Id.* at par. II.)

The plaintiffs in the second suit prayed, *inter alia*, for a declaration that said Art. V, Sec. I, Par. IV, of the Georgia Constitution was unconstitutional, for an injunction against its enforcement, and for a runoff election between Howard H. Callaway and Lester Maddox. On November 10, 1966, the three judges who had been designated in the first suit were designated as the judges in the second suit (Tr. 119). Both suits were heard on November 11 (Tr. 1-89).

In its November 17 opinion, the court below said (Appendix "A", p. 27):

> A three-judge district court was convened in each case under 28 U. S. C. A., § 2281, et seq. Jurisdiction is conferred by 28 U. S. C. A., §§ 1343 (3), 1331, 2201, and 42 U. S. C. A., § 1988.

The District Court's order and injunction, from which this appeal is taken, were entered and filed on November 17, 1966 (Tr. 233).

Appellant's notice of appeal to this Court was filed in the District Court on November 18, 1966 (Tr. 235).

The jurisdiction of the Supreme Court to hear this appeal is conferred by 28 U. S. C., §§ 1253, 2101 (b), and 2201 (as amended). Decisions sustaining the Court's jurisdiction to review orders and injunctions issued by three-judge District Courts on direct appeal include *Reynolds v. Sims*, 377 U. S. 533 (1964) and *Fortson v. Toombs*, 379 U. S. 621 (1965).

GEORGIA CONSTITUTIONAL PROVISION INVOLVED.

The District Court declared unconstitutional and void that portion of the Georgia Constitution which appears in italics below:

> The members of each branch of the General Assembly shall convene in the Representative Hall, and the President of the Senate and Speaker of the House of Representatives shall open and publish the returns in the presence and under the direction of the General Assembly; and the person having the majority of the whole number of votes, shall be declared duly elected Governor of this State; *but, if no person shall have such majority, then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary to a choice.* Art. V, Sec. I, Par. IV (Ga. Code Ann., § 2-3004) (Italics added).

The court below stated that the question presented to it was whether the election system; i. e., by the General Assembly, was proscribed by the rationale of this Court's

decision in *Gray v. Sanders,* 372 U. S. 368 (1963) (see Appendix "A", p. 29). The District Court's *per curiam* opinion was not based upon alleged malapportionment (Appendix "A", pp. 27-28). During the hearing on November 11, 1966, the court said that it then was of the tentative view that the General Assembly could not constitutionally elect a governor even if it were perfectly apportioned (Tr. 1, Transcript of November 11, 1966, hearing, 78-79).

Other provisions of the Georgia Constitution and of the laws of Georgia which are directly involved in this litigation are set forth in Appendix "B" (pp. 34-38).

QUESTIONS PRESENTED.

1. Did the District Court err in declaring unconstitutional and void that part of the Georgia Constitution providing that the General Assembly of Georgia would elect a governor when no candidate for that office in the General Election received a majority of the votes cast?

2. Even if the question stated above were to be answered in the negative, by declaring unconstitutional said provision of the Georgia Constitution and by enjoining the Secretary of State of the State of Georgia from seeking to cause the election of a governor by the General Assembly, did the court below abuse its discretion and err in (i) overlooking "the mechanics and complexities of the state election laws" (*Reynolds v. Sims,* 377 U. S. 533, 585) (1964), and by (ii) disrupting the election process by "requiring precipitate changes" that make unreasonable demands on the State and its citizens (*Ibid.*)?

3. As subsidiary questions to both the first and second questions stated above, did the court below err in extending the rationale of *Gray v. Sanders* to the point of leav-

ing Georgia without a newly elected governor and without procedures for electing one?

(a) Where a valid provision of a State Constitution requires that a governor be elected by majority vote, and no candidate in the General Election receives such majority by reason of the casting of a relatively small bloc of write-in votes, does *Gray v. Sanders* permit, in a runoff election between the two candidates receiving the highest number of votes, the exclusion and discounting of write-in votes so that a majority may be obtained, or does *Gray v. Sanders* require the equal counting of such write-in votes in the runoff election, with the possible result that no candidate will receive the required majority for election as governor?

(b) If *Gray v. Sanders* requires the counting of write-in votes in such runoff election, does not *Gray v. Sanders* permit the disruption of the election process by a small group of voters, and allow them to keep the incumbent in office, pending a special or general election open to a candidate or candidates acceptable to them, where another runoff may be required with the casting of write-in votes again preventing any candidate from receiving the required majority?

(c) Does *Gray v. Sanders,* when so extended and interpreted, in effect force a state to abandon a valid and desirable requirement that its governor be elected by majority vote, and to adopt the plurality system of election, thereby losing the assurance that the governor be elected by, and be responsible to, the majority of the people; or does *Gray v. Sanders* in its basic concept require that no candidate be elected by less than a majority, thereby invalidating the plurality system of election?

STATEMENT OF THE CASE.

On September 14, 1966, the Democratic Party of Georgia conducted a primary for the nomination of candidates to numerous State and County offices, including the office of governor. The candidates for nomination to that office received votes as follows (Tr. 139, 178, Request No. 6):

Ellis G. Arnall	231,480
Lester G. Maddox	185,672
Jimmy Carter	164,562
James Gray	152,973
Garland T. Byrd	39,994
Hoke O'Kelly	13,271
Total	787,952

Because no gubernatorial candidate received a majority, the Democratic Party conducted, on September 28, 1966, a runoff primary between the two candidates who had received the highest number of votes. The result of the runoff was as follows (Tr. 139, 178, Request No. 7):

Lester G. Maddox	443,055
Ellis G. Arnall	373,004
Totals	816,059

Lester G. Maddox became the nominee of the Democratic Party for the office of governor.

Howard H. Callaway was the nominee of the Republican Party of Georgia for that office (Tr. 139, 178, Request No. 8).

Prior to the General Election, interest developed in "writing-in." On October 21, 1966, the Attorney General pointed out to the Secretary of State that the provision

of the Georgia Election Code relating to a runoff election would not apply in the governor's race (Tr. 139, 178, Request No. 9, Pl. Ex. A).

The General Election was held on Tuesday, November 8, 1966.

On Wednesday, November 9, 1966, the first of these two suits was filed in the District Court (Tr. 90). The plaintiffs in that suit (John Morris, *et al.* v. Ben W. Fortson, *supra*) sought, *inter alia*, to enjoin the election of a governor by the General Assembly until it is reapportioned—in or before 1969. See *Toombs v. Fortson*, 241 F. Supp. 65 (N. D. Ga. 1965); *Toombs v. Fortson*, 384 U. S. 210 (1966).

On Thursday, November 10, 1966, the second suit was filed (Tr. 106). The plaintiffs in that suit (Larry G. Justice, *et al.* v. Ben W. Fortson, Jr., *supra*) sought to enjoin the election of a governor by the General Assembly and to require the holding of a runoff election between Howard H. Callaway and Lester G. Maddox.

On Friday, November 11, 1966, the three-judge court heard argument in both cases.[1]

Appellant's responsive pleadings (Motions to Dismiss and Answers in both suits) were filed on Monday, November 14 (Tr. 120-134).

As of 1 p. m. on November 11, 1966, the unofficial returns compiled by the News Election Service, composed of Associated Press and United Press International and three radio and television networks (ABC, CBS and NBC) showed the results of the November 8 gubernatorial race as follows:

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[1] By letter dated and filed November 15, 1966, the Attorney General advised the District Court that he did not insist upon compliance with the five-day requirement of 28 U. S. C., § 2284 (2) (1960) (Tr. 183).

Howard H. Callaway; Republican	449,894
Lester G. Maddox; Democrat	448,044
Ellis G. Arnall; Write-in	57,832
Total	955,770

No one had a majority. (The foregoing information appears from Plaintiffs' Requests for Admissions, Tr. 139, pars. 4 and 11, served and answered, Tr. 178, on November 15, 1966.)

Under the Georgia Constitution (Art. V, Sec. I, Par. III, Ga. Code Ann. § 2-3003) and the Georgia Election Code, § 34-1506 (c) (Appendix "B", pp. 35, 37), the official returns of the governor's election are sealed by the ordinary of each county, directed to the President of the Senate and Speaker of the House of Representatives, and transmitted to the Secretary of State, who "without opening said returns" causes them to be laid before the Senate on the day after the two houses organize. In 1967, the two houses will convene on January 9.

The General Assembly, in joint session, opens and publishes the returns of the election for governor and determines all questions relating thereto. Ga. Laws 1949, p. 948; Georgia Code Ann. § 40-104.1 (Appendix "B", p. 36). Thus, the official returns have not been opened and their tabulation has not yet taken place.

Without in any way undertaking to infringe upon the prerogatives of the General Assembly, in view of the decision of the court below Appellant's counsel hereby stipulate, for the purpose of expediting the disposition of this appeal in the interest of the citizens of this State, that this Court may asssume that when the General Assembly opens the official election returns no one will have received a majority of the votes cast for the office of governor.

On Tuesday, November 15, the plaintiffs in the first suit (John Morris, *et al.* v. Ben W. Fortson, *supra*) filed a second motion for injunction (Tr. 184). In that motion, plaintiffs prayed not for a runoff but for a special election; i. e., an election open to any candidate.

On Thursday, November 17, the District Court entered its opinion and the order from which this appeal is taken, declaring unconstitutional and void that part of Art. V, Sec. I, Par. IV of the Georgia Constitutional which authorizes the election of a governor by the General Assembly where no candidate has received a majority of the votes cast, and enjoining Appellant from seeking to cause such an election by the members of the General Assembly. See Appendix "A" (pp. 32-33).

THE QUESTIONS ARE SUBSTANTIAL.

The 1966 General Elections are over in 49 States. In those States, the names of the winners are known. They have thanked their supporters and are making plans to fulfill the duties of their offices. The bitterness of political charge and countercharge is almost forgotten.

In Georgia, the election of the State's chief executive officer is not over. The name of the winner is not known. The campaigning and the political charges continue.

There is, however, no breakdown in government. Georgia has a Governor elected in 1962 who "shall hold his office . . . until his successor shall be chosen and qualified." (Art. V, Sec. I, Par. I., Constitution of Georgia, Ga. Code Ann., § 2-3001; Appendix "B", p. 34).

Prior to 1824, the General Assembly of Georgia elected the governor in the first instance. In 1824 an amendment to the Georgia Constitution of 1798 was adopted whereby the governor was elected by the people, except that when

no person received a majority, the General Assembly was to elect the governor (Dawson, Compilation of Georgia Laws, p. 116 [1831]; Cobb, Digest, p. 1118 [1851]; Ga. Laws 1823, Act No. 270).

Once, in 1947, the governor-elect, who had received a majority, died before taking office. After a motion declaring that the legislature had no authority to elect a governor failed to carry by a vote of 118 to 132[2], the General Assembly undertook to elect the governor. That was the only time since 1824 the legislature ever undertook to elect the governor. The Georgia Supreme Court held such election by the General Assembly to be invalid under the particular circumstances of that case. *Thompson v. Talmadge,* 201 Ga. 867, 41 S. E. 2d 883 (1947).

Today the name of Georgia's next governor again is not known. This time there is no dispute over possession of the governor's office, but the District Court has, in politically motivated suits, declared unconstitutional that provision of the Georgia Constitution which has been a part of Georgia's Constitutions of 1861, 1865, 1868, 1877 and 1945[3], without criticism until the heat of politics was felt.

Because the official returns, under valid provisions of the Georgia Constitution and law (Art. V, Sec. I, Par. III, Ga. Code, § 34-1506; Appendix "B", pp. 35, 37), are to remain sealed until tabulated by the General Assembly (Ga. Laws 1949, 948; Ga. Code Ann. § 40-104.1; Appendix "B", p. 36), there is no way to elect a governor in Georgia this year, except by judicial decree.

By eliminating that provision of Georgia constitutional law which would have avoided the doubt created by

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2 Ga. H. R. Jour., J. S. Res. 3, 36-28 (1947).

3 Ga. Const. Art. III, Sec. I, Par. II (1861); Ga. Const. Art. III, Sec. I, Par. II (1865); Ga. Const. Art. IV, Sec. I, Par. II (1868); Ga. Const. Art. V, Sec. I, Par. V (1877); and Ga. Const. Art. V, Sec. I, Par. IV.

these two suits, the decision of the District Court has left the people in a quandry. Must the election of a governor await reapportionment? Will there be a runoff between Callaway and Maddox, and, if so, will write-in votes be counted? Will there be a special election open to all candidates?

The questions presented by this appeal are substantial.

The District Court stated that the question presented is whether this election system: i. e., election by the General Assembly from the two candidates receiving the highest number of votes, where no one received a majority, is proscribed by the "rationale" of this Court's decision in *Gray v. Sanders* (Appendix "A", p. 29). In *Gray*, the county-unit system of nomination in the Democratic Party primary was invalidated on the "one person-one vote" principle. This Court enumerated many of the things it was not dealing with in *Gray* (372 U. S. at 376, 378, 381-382). The Court did not expressly include or exclude in *Gray* the questions at bar.

We respectfully submit that the District Court erred in its understanding of the rationale of *Gray v. Sanders*. We respectfully submit that *Gray* does not require that all State officers be elected by popular vote. In Georgia the State Auditor is elected by the General Assembly (Ga. Laws 1943, 361-363; Ga. Laws 1945, 115-117; Ga. Code Ann., § 40-1801). In several States the Attorneys General, Secretaries of State and State Auditors are appointed by the Governor or elected by the Legislature.[4] In other States these officers are elected by popular vote. Some State judges are elected. Others are appointed in the first instance. *Gray v. Sanders* itself does not invalidate

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[4] See Appendix "C". Would the English system of having the Prime Minister elected by the representatives to Parliament be unconstitutional if adopted by a State?

the election of State officers by State Legislatures or require that they be elected by popular vote.

In *Gray v. Sanders*, 372 U. S. at 381, the Court said that ". . . once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded." The voters of Georgia wisely, years before the problem arose during the heat of a political election, chose to terminate, as of the November General Election, the class of voters entitled to vote for the office of governor. They chose also to terminate their qualification to vote under the limited circumstances alleged to exist here, and at the same time to limit the choice of the General Assembly to the two men selected by the voters. There is no inequality of voting, no discrimination between voters, no inequality in the right to vote, and no lack of equal protection of the laws, where the voters choose to let their elected representatives select a governor.

Gray v. Sanders was based upon the Equal Protection Clause (Id. at 379). There is, we submit, no unequal protection in Art. V, Sec. I, Par. IV of Georgia's Constitution. It applies equally to all.

Article V, Section I, Paragraph IV of the Constitution of Georgia was renewed and approved by a popular vote (one person-one vote) in 1945.

The elected officials of Georgia, including the Secretary of State and the Attorney General, are obligated to uphold the Constitution of Georgia and they are representing the interests of the people of this State who voted for the Constitution.

Constitutions are written, and followed, to avoid chaos and anarchy. They contain provisions to fill vacancies in leadership when the persons elected by the voters die

or resign. Georgia's Constitution, like other constitutions, provides that upon the death, resignation or disability of both the Governor and the Lieutenant Governor, the Speaker of the House of Representatives shall exercise the executive power (Ga. Const., Art. V, Sec. I, Par. VII). The Speaker is elected by the House (Ga. Const., Art. III, Sec. VI, Par. II, Ga. Code Ann., § 2-1802; Ga. Code, § 47-106). Could it be said that because he was not elected by popular vote, the Speaker could not exercise the executive power, upon the death of the Governor and Lieutenant Governor, until a new Governor could be elected? The people by their State Constitution have indicated that the orderly continuation of executive leadership is more significant than the unlimited right to vote in selecting that leadership.

By the same token, when the people have been unable to agree as to whom to elect to office in the first instance, Constitutions contain provisions for filling vacancies in leadership. Every two years we hear of instances where two candidates "tie" in their race for a particular office. Would anyone say that, in cases of "tie votes", it was unconstitutional for the people, by prior decision, to have provided that their incumbent representatives could fill the vacancy created by the inability of the voters to choose one particular candidate over the other?

Georgia's constitutional provision authorizing the General Assembly to select a governor, when no candidate has received a majority, is simply the means adopted by the citizens to provide leadership, after that leadership has not been chosen and supplied by the voters.[5] Georgia's

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[5] Vermont and Mississippi also require a majority vote for the election of the Governor. The Vermont (Vt. Const. ch. 2, § 39) and Mississippi (Miss. Const. art. V, §§ 140 and 141) Constitutions contain provisions similar to Georgia's whereby the Legislature or one house elects the Governor from the top two

constitutional provision is only one step removed from a "tie-breaking" provision.[6] As heretofore noted, the people could, constitutionally, decide that their governor, or his temporary replacement, should be elected by the legislature under certain circumstances. Can not the people also decide that if they do not give one candidate a majority, then the legislature should select the governor from the top two candidates? The people of Georgia did that when they adopted the Constitution of 1945. They reached agreement in advance, knowing that once the problem arose and the names of the candidates were known, they would be unable to agree at that time. They said in effect, we must have a governor, even if we can not agree on whom he should be, and when we do not agree, the legislature should nevertheless provide us with a governor, from the two men we chose in the first instance.

When the people of Georgia in 1824 approved the amendment whereby they thereafter elected the governor, they decided that they would do so when they gave one candidate a majority, but they said, in effect, if the candidates are so equally matched that we give no one a majority, then we want our elected representatives, who know the candidates, their qualifications and the requirements of the office, to elect a governor, from the two we chose in the first instance.

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or three candidates. See Appendix "D", sec. I, p. 41. Two other states, Rhode Island (R. I. Const. amend. 11, § 3) and Maine (Me. Const. art. 5, § 3) may have similar provisions. It is not clear to us whether Rhode Island and Maine require a majority or plurality for the election of the Governor, but it is clear that the Legislatures would elect the Governor when the people fail to do so. See Appendix "D", sec. II, p. 42.

[6] Thirty-six States provide that the State Legislature shall elect the governor in the event of a tie; i.e., in the event the people do not elect a governor. See Appendix "D", sec. III, p. 42. Thus, at least forty-one States have provisions whereby the legislature elects the governor where the people have failed to do so. Appendix "D", secs. 1-3, pp. 41-44.

The U. S. Constitution contains a similar provision regarding the election of the President. In its opinion (Appendix "A", p. 29), the District Court cited *Gray v. Sanders, supra,* to the effect that "a state may not avoid equality in the vote by following the federal electoral system." The court below missed the point, we respectfully submit. This Court in *Gray* held that the fact of numerical inequality in the electoral college was not grounds for permitting the numerical inequality of the county-unit system, but the Court did not hold that the procedure in the U. S. Constitution whereby, upon failure of the electoral college to elect the President, the House of Representatives would choose him, was an unconstitutional method of providing leadership where the voters had not. *Id.* at 378. Early this term the Court in *Delaware v. New York et al.,* No. 28 Original, 35 U. S. L. Week 3138 (U. S. Oct. 17, 1966), declined to hear Delaware's complaint that state requirements of unit voting by presidential electors; i. e., state requirements that all presidential electors vote for the presidential candidate receiving the majority of the votes, was a denial of equal protection.

In *Gray v. Sanders,* this Court noted that it was "only a voting case" (*supra* at 378). In *Reynolds v. Sims, supra* at 560, involving the reapportionment of both houses of a state legislature, the Court pointed out that *Gray* was not dispositive of or directly controlling in cases involving legislative systems.

Perhaps the will of the people should be expressed by electing public officials yearly, or quarterly, or monthly. Georgia has adopted two and four-year terms. Does *Gray* say that elections must be held every year? Clearly the answer is no. Does *Gray* say that elections must be held for all State officers? We believe that it does not. *Gray* did not deal with voting procedures and systems.

The extension of *Gray* into that area, if it is to be so extended, awaits the decision of this Court in this case. This Court already has indicated that such extension is not to be made.

In *Fortson v. Dorsey,* 379 U. S. 433 (1965), involving the validity of multi-member senatorial districts, a three-judge District Court in Georgia, citing *Gray,* had held that multi-member districts were an invidious discrimination. *Dorsey v. Fortson,* 228 F. Supp. 259, 263 (N. D. Ga. 1964). On appeal, this Court declined to apply *Gray* to such an election system case, and reversed the lower court.

The lower federal courts, in states other than Georgia, have interpreted *Gray v. Sanders, supra,* as involving voting rights, weight and counting, and not as involving election procedures and systems. In *Pitts v. Kunsman,* 251 F. Supp. 962 (E. D. Pa. 1966), the court, citing *Gray v. Sanders,* held that the election by school directors of an interim operating committee of the school board, required by state law to be elected with consideration given to the principle of proportionate representation according to population, which interim committee was not so constituted, did not violate the Equal Protection Clause, saying:

> This indirect method of election used here does not destroy the concept of equal protection, because the vote of each citizen is still given equal weight in choosing those persons he is in fact called upon to elect. *Id.* at 965.

In *Bush v. Martin,* 224 F. Supp. 499 (S. D. Tex. 1963), *aff'd.* 376 U. S. 222, a reapportionment case, a three-judge court cited *Gray,* saying:

> The present indications are that considerable leeway must be allowed to the States in the diffusion of its political initiative. *Id.* at 511.

In *Lynch v. Torquato,* 343 F. 2d 370 (3rd Cir. 1965), suit was instituted to enjoin the precinct-unit election of the chairman of a county political party who would have the power, upon the death or withdrawal of the party primary nominee between the primary and election, to appoint a substitute nominee as a candidate for public office. In a note to its opinion holding *Gray v. Sanders* to be inapplicable, that court said:

> The question at what stage popular choice must rule in the process of selecting public officials is a difficult one with far reaching implications. Indeed, choice of delegates to party national conventions for the nomination of candidates for President and Vice President would seem logically to be covered by the plaintiffs' view of the reach of the equal protection clause. *Id.* at 372, note 5.

Thus that court indicated that it felt *Gray v. Sanders* did not answer all the questions as to what stage popular choice must rule in the process of selecting public officials. See *Baker v. Carr,* 369 U. S. 186 at 217, 222, 226, 228, 231-232 (1962).

Certainly *Gray v. Sanders* would not invalidate tie-breaking provisions of thirty-six states (Appendix "D", sec. III, p. 42) because such a holding would create situations where the States would be without executive leadership. A "tie-breaking" provision almost necesasrily puts the election of the governor into one or both houses of the legislature. If it is constitutional for the legislature to elect a governor in cases of tie votes, is it not constitutional for the legislature to elect a governor under such conditions as the people by popular vote establish by their constitution?

The court below said that the fact that the people adopted the Georgia Constitution by popular vote was

immaterial in view of this Court's decision in *Lucas v. Colorado General Assembly,* 377 U. S. 713 (1964) (see Appendix "A", p. 30). The Court in *Baker v. Carr,* 369 U. S. 186 (1962), and *Reynolds v. Sims,* 377 U. S. 533 (1964), had held that malapportioned legislatures were unconstitutional. In *Lucas, supra,* the Court held that malapportioned legislatures were unconstitutional (violated the rights of a minority of the people) even though a majority of the people may have voted for such malapportionment. The *Lucas* decision does not, we submit, stand for the proposition that every state constitutional provision must be adopted by unanimous vote to avoid violating the rights of a minority of the people, nor does it stand for the proposition that the people may not, by majority vote, provide for various elective processes for the selection of their public officials.

The requirement that a governor be elected by majority vote is a desirable one in Georgia as evidenced by the fact that the people ratified a constitution so providing. The requirement of a majority vote assures that the governor will be responsible to the majority, if not all, of the voters. The requirement of a majority undoubtedly has dissuaded a candidate of one political philosophy, opposed by a candidate of another philosophy, from encouraging a third person, with views similar to those of his opponent, to make it a three-man race, hoping thereby to spilt the votes of those in sympathy with his opponent's views. This might work well under the plurality system, but not under the majority system because he could expect his opponent to retaliate so that neither would get the required majority short of a runoff.

The fact that many states elect their governors by plurality (Appendix "D", sec. III, p. 42) may have been necessitated by the expenses of campaigning for and conducting runoff elections in order to obtain a majority.

Georgia has preserved the valid and desirable majority requirement, coupled with the right to cast write-in votes. At the same time, Georgia has avoided the expenses of state-wide runoffs by its constitutional provision which the court below has struck down. Primaries and elections are expensive to the candidates. Runoffs are also. A man of moderate means can hardly run for office today without financial support from others. The "others" most willing to contribute seek something in return. By its action, the court below, if not reversed, may have in effect required Georgia to abandon the desirable majority system of election.

Federalism is designed to permit diversity, not to impose uniformity. 1 J. Bryce, THE AMERICAN COMMONWEALTH 353 (revised ed., 1911).

We respectfully submit that the District Court erred in its understanding of *Gray v. Sanders.* In its opinion (Appendix "A", p. 30), the District Court said that once the popular vote system for the election of the governor was adopted, it must be followed to conclusion by popular vote. After expressing the view that if the governor were elected in the first instance by the legislature, such a system would be valid,[7] the court below declined to recognize the right of the people to shift the responsibility for electing the governor to the General Assembly. That court said that the vote of each voter, according to *Gray,* must be treated equally, as if *Gray* said that a voter's vote may never be discounted at any time along the line. Once the votes are in and counted, the winner takes office and the loser goes home. The votes cast for the loser go for naught, as if they had never been counted. The only way the loser's votes could continue to have effect after the election would be the

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[7] Tr. 1, Transcript of November 11, 1966, hearing, page 63.

establishment of a biumvirate or triumvirate, with authority prorated according to votes received. Thus *Gray* does not stand for the proposition that each vote must be treated equally after the election. Georgia has had its election and the fact that some of those votes can not be given effect by the members of the General Assembly in electing a governor is not prohibited by *Gray*.

The court below pointed out that "each legislator would stand as a unit in selecting the Governor, and his vote would necessarily eliminate the will of his constituents who voted for the other candidate" (Appendix "A", p. 30). This is true of virtually every act under the republican form of government. A legislator stands as a unit in voting for particular legislation, and his vote eliminates the will of his constituents who are opposed to the enactment. The people knew this when they adopted the republic, and they keep it in mind when voting for, and entrusting this power to their legislators. It is a consequence of the republican form, not grounds for limiting the choice of systems.

If *Gray v. Sanders* were to be applied here, there would appear to be only three reasonable alternatives, none of which guarantees a solution to the problem.

(1) A continuation in office of the incumbent (or, if he resigns, the promotion of the newly-elected Lieutenant Governor); or

(2) A runoff, or runoffs, between the two candidates who received the highest number of votes in the general election; or

(3) A special election open to all candidates, with runoffs therefrom.

In Georgia, the incumbent Governor "shall hold his office during the term of four years, and until his suc-

cessor shall be chosen and qualified." Ga. Const., Art V, Sec. I, Par. I; Ga. Code Ann., § 2-3001 (Appendix "B", p. 34). The incumbent is very popular in Georgia, but someone might assert a constitutional right to have a new governor in order to limit the incumbent to the four-year term for which he was elected and to prevent a dynasty.

The Georgia Election Code (§ 34-1514; Appendix "B", p. 37) does not deal with runoff elections for governor. Code, § 34-1506 (c) specifies that the returns of the election for governor are to be transmitted by the ordinaries to the Secretary of State, "who shall, without opening such returns, cause the same to be laid before the Senate on the day after the two Houses shall have been organized. . . ." (See Appendix "B", p. 37). The Georgia Constitution contains the same provision, Art. V, Sec. I, Par. III (Ga. Code Ann., § 2-3003) (Appendix "B", p. 35). No attack has been made on the method of transmission. It is therefore not possible under existing, unchallenged law to have a runoff in the governor's race on the fourteenth day following the General Election. Hence it appears clear that the Election Code did not contemplate a gubernatorial runoff. This conclusion is fortified by the existence of the provision of the Georgia Constitution here under consideration, Art. V, Sec. I, Par. IV (Appendix "B", p. 35), and the comparable provision of the proposed constitution of 1964, Ga. Laws, May-June, 1964, Ex. Sess., 234, 286, Art. 4, Sec. 7, Pars 3 and 4 (Appendix "B", pp. 35-36). The Georgia Election Code was adopted at the same Extraordinary Session as the proposed constitution. Ga. Laws, May-June, 1964, Ex. Sess., 26-220. Moreover, 14 days is not enough time to receive the official returns, canvass them, print sample ballots, mail them to the ordinaries, print ballots, mail them to absentee voters, and receive completed absentee ballots before a state-wide runoff election.

If a runoff election nevertheless were to be held, some will argue that they have the right, under *Gray v. Sanders,* to cast write-in votes. They will write-in, and then cite *Gray* for the proposition that (372 U. S. at 380): "Every voter's vote is entitled to be counted . . ." in determining whether any man has a majority.[8] In that way a bloc of voters could require a runoff after runoff and block the election process.

If a special election were to be held, prior experience this year indicates that no candidate would receive a majority, and a runoff from that special election would be required, in which write-in votes would be cast in the same fashion and with the same result as indicated above.

If *Gray* were to be extended to require a runoff, or a special election and a runoff, and to permit write-in votes to be counted, then the only reasonable alternative would be election by plurality, not majority. Election by majority rather than simple plurality has long been thought to express the will of the voters more faithfully. Often the second man in a primary has won the runoff; i. e. the majority of the people when choosing between two men, preferred a man who had run second in a field of three or more.

None of the alternatives to the dilemma created by the District Court's order guarantees a solution to the problems that order has created.

Under the circumstances, we respectfully submit that in entering its injunction the District Court abused its discretion and erred in (i) overlooking "the mechanics and complexities of the state election laws" (*Reynolds v. Sims,* 377 U. S. at 585 (1964)) and by (ii) disrupting the election process by "requiring precipitate changes"

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[8] See *Stewart v. Cartwright,* 156 Ga. 192, 197, 118 S. E. 859 (1923), holding that, in a general municipal election, there is a constitutional right to write-in.

that make unreasonable demands on the State and its citizens (*Ibid.*).[9]

In its opinion, the District Court observed that the provision of the 1945 Georgia Constitution in question in these suits came into being in 1824, and said (Appendix "A", p. 28): "These cases bring into focus the question of gearing the Georgia Constitution to updated federal constitutional concepts." All that is old is not unconstitutional. This same provision was noted, in *Sanders v. Gray,* 203 F. Supp. 158, 162 (D. C. Ga. 1962), without criticism by two of the three members of the court below. Georgia's effort to submit a new constitution to the voters in 1964 was enjoined by the court below. See *Fortson v. Toombs,* 379 U. S. 621 (1965). The provisions the court below now says is outdated was not in the proposed constitution of 1964. Ga. Laws, May-June 1964, Ex. Sess., 234, 286, Art. 4, Sec. 7, Pars. 3 and 4 (Appendix "B", pp. 35-36). Georgia has been in the intolerable position of having been prohibited from adopting a new constitution in the off-year 1964 election, and having its existing constitution declared invalid as being outdated as to the 1966 gubernatorial election.

Contrary to the view held by the District Court, we respectfully submit that *Toombs v. Fortson,* 384 U. S. 210 (1966), and *Fortson v. Toombs,* 379 U. S. 621 (1965), are applicable here, particularly the statement by Justice Harlan, in the decision last cited, that the legislature of Georgia possesses, and is entitled to exercise free from intrusion, the full panoply of legislative powers accorded by Georgia law.

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[9] The Appellees seek to prevent the General Assembly from selecting a governor from the two persons having received the highest number of votes. The Secretary of State, the sole defendant in this suit, cannot enact legislation, and cannot prevent the general Assembly from voting on legislation. How can he prevent it from voting on other matters? He is not a proper party defendant.

CONCLUSION.

It is respectfully submitted that the order of the District Court should be reversed as error and as an abuse of discretion.

.....
ARTHUR K. BOLTON,
Attorney General,

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G. ERNEST TIDWELL,
Executive Assistant Attorney General,

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HAROLD N. HILL, JR.,
Assistant Attorney General,

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GERALD H. COHEN,
Deputy Assistant Attorney General,

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ALEXANDER COCALIS,
Deputy Assistant Attorney General,

Attorneys for Appellant, Ben W. Fortson, Jr., Secretary of State.

Proof of Service.

I, Harold N. Hill, Jr., Assistant Attorney General of the State of Georgia, hereby certify that I am of counsel

for the Appellant Ben W. Fortson, Jr., that I am a member of the Bar of the Supreme Court of the United States, and that on November 24, 1966, I served the within and foregoing Jurisdictional Statement and Appellant's Brief on the merits upon the Appellees herein named by personally delivering true copies thereof to their Attorneys of Record, Morris Brown and Emmett Bondurant.

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Of Counsel for Appellant.

APPENDIX "A".

OPINION AND ORDER OF THE COURT OF NOVEMBER 17, 1966.

Opinion.

Per Curiam.

The complaint in *Morris, et al. v. Fortson* is a class action seeking a declaratory judgment that Article V, Section I, Paragraph IV, of the Constitution of Georgia, Ga. Code, § 2-3004, conflicts with the Federal Constitution on two grounds. First, it is alleged that it would permit the malapportioned General Assembly of Georgia to elect a Governor of Georgia. Second, it is claimed that the election system set forth in that provision of the Georgia Constitution violates the Equal Protection Clause of the Fourteenth Amendment as interpreted by the Supreme Court in the "Georgia County Unit Case", *Gray v. Sanders,* 1963, 372 U. S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821, and particularly that portion of the decision which announces the "one person, one vote" principle as being required in state elections. The complaint in *Justice, et al. v. Fortson,* rests on these same contentions and others which we do not reach. These cases were consolidated for hearing on the prayer in each for temporary relief.

A three-judge district court was convened in each case under 28 U. S. C. A., § 2281, et seq. Jurisdiction is conferred by 28 U. S. C. A., §§ 1343 (3), 1331, 2201, and 42 U. S. C. A., § 1988. A justiciable controversy is presented within the meaning of *Baker v. Carr,* 1962, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663, and its progeny including *Gray v. Sanders,* supra. Being of the view that *Gray v. Sanders,* supra, is controlling, a discussion of the allegations resting on malapportionment is also unnecessary.

The paragraph of the 1945 Georgia Constitution under attack provides as follows:

> "The members of each branch of the General Assembly shall convene in the Representative Hall, and the President of the Senate and Speaker of the House of Representatives shall open and publish the returns in the presence and under the direction of the General Assembly; and the person having the majority of the whole number of votes, shall be declared duly elected Governor of this State; but if no person shall have such majority, then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary to a choice."

This Georgia constitutional provision came into being as an 1824 amendment to the Constitution of 1798. It thus long antedated the interpretation placed on the Equal Protection Clause of the Fourteenth Amendment in *Gray v. Sanders,* and even the Fourteenth Amendment itself. These cases bring into focus the question of gearing the Georgia Constitution to updated federal constitutional concepts.

The complaints allege that in the General Election of November 8, 1966, no candidate for Governor received a majority of the total vote cast.[1] The Court takes judicial

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[1] This contention is based on information and belief inasmuch as the Georgia Constitution, Art. V, Sec. I, Paragraph III, and the Georgia Election Code, § 34-1506, requires that the election returns in an election for Governor and certain other constitutional offices, be sealed and transmitted by the Secretary of State to the General Assembly for canvassing and for the issuance of election certificates at the next session of the General Assembly.

cognizance of this public fact. It follows that the Georgia constitutional provision in question is applicable and that the Legislature, pursuant to that provision, is under the duty to seelct as Governor one of the two candidates receiving the highest number of votes in the election. The General Assembly is empowered under this provision to select either candidate, which means that they may select the candidate receiving the lesser number of votes.

The question presented is whether this election system is proscribed by the rationale of the Supreme Court in *Gray v. Sanders,* supra, as it related to the Equal Protection Clause of the Fourteenth Amendment. It is to be noted that the Georgia provision is patterned after the federal electoral college principle as it is embraced in the Twelfth Amendment to the Federal Constitution. But the Court pointed out in *Gray v. Sanders,* supra, that a state may not avoid equality in the vote by following the federal electoral system. Moreover, it makes it plain beyond peradventure that once the class of voters is selected, the vote of each voter is to be treated the same. Here Georgia has selected the class of voters in the election process for Governor. It is popular vote. The system was followed. More than 900,000 Georgia voters participated. The vote of each, according to *Gray v. Sanders,* supra, must be treated equally.

The Georgia election system in the constitutional provision now under consideration permits unequal treatment of the voters within the class of voters selected, and it thus cannot stand. Many arguments may be made, but we need go no further than to point out, as stated, that the candidate receiving the lesser number of votes may be elected by the General Assembly. his would give greater weight to the votes of those citizens who voted for this candidate and necessarily dilute the votes of those citizens who cast their ballots for the candidate receiving the greater number of votes. The will of the greater number

may be ignored. In addition, each legislator would stand as a unit in selecting the Governor, and his vote would necessarily eliminate the will of his constituents who voted for the other candidate.

It is no answer to say that the General Assembly might select the candidate having the greater number of votes and thus no harm would be done. The fact that the system makes the other result possible is sufficient, by analogy with the ill-fated Georgia County Unit System, to make it subject to constitutional attack prior to its use. A fortiori, this system is contrary to the holding of the Supreme Court in *Gray v. Sanders,* supra, and our decision is controlled by that case.[2]

It might be contended that, after following the "one person, one vote" principle in the election for Governor, if a stalemate is reached in that no candidate has a majority of the vote, the people might provide for the selection of a Governor by a method which does not adhere to the "one person, one vote" principle. It can be argued that if the people approve of such deviation from the "one person, one vote" principle, their rights under the Equal Protection Clause are not violated. However, this contention is refuted by the Supreme Court's opinion in *Lucas v. Colorado General Assembly,* 377 U. S. 713, 84 S. Ct. 1472, 12 L. Ed. 2d 632, where the Court held that the fact that a challenged legislative apportionment plan was approved by a popular vote of the people is without significance if the plan adopted fails to satisfy the requirements of the Equal Protection Clause.

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[2] The General Assembly of Georgia may have provided for this eventuality in adopting the Election Code of 1964. It there provided for run-off elections, including elections for the office of Governor, where no candidate receives a majority vote in the election. Code Section 34-1514. We do not now consider the applicability of this run-off method to the contest between the two candidates for Governor who received the highest number of votes.

A declaratory judgment will be entered to the effect that so much of Article V, Section I, Paragraph IV of the Georgia Constitution which authorizes and requires the election of the Governor by the General Assembly under the circumstances here presented is unconstitutional and void. The specific language declared unconstitutional and void is as follows:

> ". . . but, if no person shall have such majority, then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary to a choice."

A judgment accordingly may be presented by counsel for plaintiffs, after notice to counsel for defendant, for entry. A stay will be granted for a period of ten (10) days after the entry of the order, within which time the defendant may seek an additional stay from the Supreme Court of the United States. The Court will retain jurisdiction for such other and further proceedings as may be deemed equitable and just.

This the 17th day of November, 1966.

/s/ Elbert P. Tuttle,
Elbert P. Tuttle,
United States Circuit Judge,

/s/ Griffin B. Bell,
Griffin B. Bell,
United States Circuit Judge,

/s/ Lewis R. Morgan,
Lewis R. Morgan,
United States District Judge.

Order.

The Court having heard oral argument on November 11, 1966, and being advised in the premises, it is now

Ordered, Adjudged and Decreed as follows:

1. Those portions of Article V, Section I, Paragraph IV of the Georgia Constitution (Georgia Code, Section 2-3004), which authorize and require the election of the Governor of Georgia by the General Assembly, are hereby declared unconstitutional and void. The specific language declared unconstitutional and void is as follows:

> "... but, if no person shall have such majority then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary to a choice."

2. The defendant, Ben W. Fortson, individually and in his capacity as Secretary of State of Georgia, and all persons having actual notice of this Order, are hereby restrained and enjoined from seeking to cause the election of the Governor of Georgia by the members of the General Assembly.

3. This order is hereby stayed until November 28, 1966, in order to permit the defendant to seek an additional stay of this order from the Supreme Court of the United States.

4. This Court hereby retains jurisdiction to enter such other and further orders as may be required to further implement and effectuate the provisions of this decree.

This 17th day of November, 1966.

/s/ Elbert P. Tuttle,
Elbert P. Tuttle, (m)
United States Circuit Judge,

/s/ Griffin B. Bell,
Griffin B. Bell, (m)
United States Circuit Judge,

/s/ Lewis R. Morgan,
Lewis R. Morgan,
United States District Judge.

APPENDIX "B".

Provisions of Georgia Constitution and Laws Directly Involved in This Litigation.

GEORGIA CONSTITUTION.

Article V.

Executive Department.

Section I.

Paragraph I. (Ga. Code Ann., § 2-3001) Governor; term of office; salary, etc.—The executive power shall be vested in a Governor, who shall hold his office during the term of four years, and until his successor shall be chosen and qualified. The Governor serving at the time of the adoption of this Constitution and future Governors shall not be eligible to succeed themselves and shall not be eligible to hold the office until after the expiration of four years from the conclusion of his term of office. He shall have a salary of . . . The State officers, required by this Constitution to be elected at the same time, for the same term, and in the same manner as the Governor shall also hold office for four years.

Paragraph II. (Ga. Code Ann., § 2-3002) Election for Governor.—The first election for Governor, under this Constitution, shall be held on Tuesday after the first Monday in November of 1946, and the Governor-elect shall be installed in office at the next session of the General Assembly. An election shall take place quadrennially thereafter, on said date, until another date be fixed by the General Assembly. Said election shall be held at the places of holding general elections in the several counties of this State, in the manner prescribed for the election of

members of the General Assembly, and the electors shall be the same.

Paragraph III. (Ga. Code Ann., § 2-3003) Returns of elections.—The returns for every election of Governor shall be sealed up by the managers, separately from other returns, and directed to the President of the Senate and Speaker of the House of Representatives, and transmitted to the Secretary of State, who shall, without opening said returns, cause the same to be laid before the Senate on the day after the two houses shall have been organized, and they shall be transmitted by the Senate to the House of Representatives.

Paragraph IV (Ga. Code Ann. § 2-3004). How returns published.—The members of each branch of the General Assembly shall convene in the Representative Hall, and the President of the Senate and Speaker of the House of Representatives shall open and publish the returns in the presence and under the direction of the General Assembly; and the person having the majority of the whole number of votes, shall be declared duly elected Governor of this State; but, if no person shall have such majority then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary to a choice.

Proposed (But Unadopted) Constitution of 1964.

Georgia Laws, May-June 1964 Extra Session, page 234 at 286, Article 4, Section 7:

Paragraph 3. Publication of Returns. The members of both houses of the General Assembly shall convene in the Representative Hall, and the President of the Senate

and the Speaker of the House of Representatives shall open and publish the returns under the direction of the General Assembly. The person having the majority of the whole number of votes shall be declared duly elected to each of said offices. Whenever no person is elected in the general election to fill any such office, or whenever any person elected shall die or withdraw prior to taking any such office, the Secretary of State shall call a special election, which shall be held not less than sixty nor more than one hundred twenty days from the date of any such event, to fill such position. The incumbent officer shall continue to serve until his successor can be elected and qualified.

Paragraph 4. Runoffs. Whenever a runoff is required under this Constitution or under any valid law, the runoff shall be considered as a part of the election and may be held at such time after the date prescribed in this Constitution for the election as is fixed by law.

Georgia Laws.

Georgia Laws 1949, page 948 (Ga. Code Ann. § 40-104.1):

Section 4. The General Assembly, in joint session of the Senate and House of Representatives, shall open and publish the returns of the election for Governor as provided by Article V of the Constitution of the State, and shall determine all questions relating thereto, including any contested election, and any question as to the eligibility or qualifications of the person elected Governor, and shall, at the time provided by Section 2 of this Act, inaugurate as Governor the person determined by the General Assembly to have been elected, or the person elected by the General Assembly as provided by the Constitution.

Georgia Code Sections.

Ga. Code § 34-1506 (c):

The returns of every election of Governor, Lieutenant Governor, Secretary of State, Attorney General, State School Superintendent, Comptroller General, Treasurer, Commissioner of Agriculture, and Commissioner of Labor shall be sealed up by the ordinary separately from the other returns, and directed to the President of the Senate and Speaker of the House of Representatives, and shall be transmitted to the Secretary of State, who shall, without opening such returns, cause the same to be laid before the Senate on the day after the two Houses shall have been organized, and they shall be transmitted by the Senate to the House of Representatives.

Ga. Code, § 34-1514:

Majority vote required to nominate or elect; exception; runoff primary or election.—No candidate shall be nominated for public office in any primary or elected to public office in any election unless such candidate shall have received a majority of the votes cast to fill such nomination or public office. In instances where no candidate receives a majority of the votes cast, a runoff primary or election shall be held, between the two candidates receiving the highest number of votes, on the fourteenth day after the day of holding the first primary or election, unless such runoff date is postponed by court order. The candidate receiving a majority of the votes cast in such runoff primary or election to fill the nomination or public office he seeks shall be declared the winner. Only the electors entitled to vote in the first primary or election shall be entitled to vote in any runoff primary or election resulting therefrom; provided, however, that no elector shall vote in a runoff primary in violation of Section 34-624. The State executive committee of a political party holding a

runoff primary in an area involving two or more counties shall make prior arrangement for financing the cost of holding same.

Ga. Code, § 34-1515:

Special election on failure to nominate or elect or on death or withdrawal of officer elect.—Whenever any primary or election shall fail to fill a particular nomination or office and such failure cannot be cured by a runoff primary or election, or whenever any person elected to public office shall die or withdraw prior to taking office, then the authority, with whom the candidates for such nomination or office filed their notice of candidacy, shall thereupon call a special primary or election to fill such position.

APPENDIX "C".

State Law Relating to Election of State Officers by the Legislature and Appointment of State Officers by the Governor.

I. State Officers Elected by Legislature:

State	Office	Constitutional or Statutory Provision
Alaska	State Auditor	Art. IX, Sec. 14
California	Auditor General	Gov. Code, Sec. 10504 Elected by Joint Legislative Audit Committee consisting of 3 members of House and Senate
Connecticut	Judges of Supreme Court (after nomination by Governor)	Art. V, Sec. 2
Georgia	State Auditor	Code Ann. Sec. 40-1801
Hawaii	State Auditor	Art. IV, Sec. 8
Maine	Secretary of State State Treasurer Attorney General	Art. V, Pt. III, Sec. 1 Art. V, Pt. IV, Sec. 1 Art. IX, Sec. 11
Maryland	State Treasurer	Art. V, Sec. 1
Michigan	Auditor General	Art. IV, Sec. 53
New Hampshire	Secretary of State State Treasurer	Part 42, Art. 67 Part 42, Art. 67
South Carolina	Supreme Court Justices	Art V, Sec. 2
Tennessee	Secretary of State State Treasurer Comptroller of Treasury	Art. III, Sec. 17 Art. VII, Sec. 3 Art. VII, Sec. 3
Vermont	Justices of Supreme Court	Chap. 2, Sec. 42
Virginia	Auditor of Public Accounts Judges of Supreme Court	Art. IV, Sec. 82 Art. VI, Sec. 21

II. State Officers Appointed by Governor:

State	Office	Constitutional or Statutory Provision
Alaska	Attorney General	Art. III, Sec. 25 Alaska Statutes, Sec. 44.33.010
California	Public Utility Commission	Art. XII, Sec. 21
Delaware	Secretary of State	Art. III, Sec. 10
Georgia	Superintendent of Banks	Code Ann. Sec. 13-302
Hawaii	Attorney General	Sec. 14A-2
Louisiana	State Bank Commissioner	Art. VI, Sec. 18
Maine	All Judicial Officers Except Probate Judge	Art. V, Pt. 1, Sec. 8
Maryland	Secretary of State	Art. II, Sec. 22
New Hampshire	Attorney General and All Judicial Officers	Part II, Art. 46
New Jersey	Secretary of State Attorney General	Art. V, Sec. 4, Par. 3 Art. V, Sec. 4, Par. 3
New York	Secretary of State Banking Superintendent Superintendent of Insurance	Executive Law, Sec. 90 Banking Law, Sec. 12 Insurance Law, Sec. 10
Pennsylvania	Secretary of Commonwealth Attorney General	Art. IV, Sec. 8 Art. IV, Sec. 8
Texas	Secretary of State Attorney General	Art. IV, Sec. 17 Art. IV, Sec. 23
Utah	Insurance Commissioner Bank Commissioner	Code Ann. Sec. 31-2-2 Code Ann. Sec. 7-1-1
Virginia	Secretary of Commonwealth State Treasurer	Art. IV, Sec. 80 Art. IV, Sec. 81
Wyoming	State Examiner Attorney General	Art. IV. Sec. 14 Statutes Ann. Sec. 9-121

APPENDIX "D".

State Law Relating to Plurality or Majority Voting in Selecting a Governor and Election by the Legislature When the People Fail to Elect.

I.

The following three states provide for election of Governor by majority vote, with election by the State Legislature in the event no candidate receives a majority:

State	Constitutional Provision.
Georgia	Article V, Sec. I, Par. 4 If no candidate receives a majority of the whole number of votes, the Legislature chooses from the top two.
Mississippi	Article V, Secs. 140, 141 If no candidate receives a majority of the electoral votes and also a majority of the popular votes, the House of Representatives chooses from the top two in popular votes. Electoral votes are awarded for each district a candidate carries in an amount equal to the number of the members of the House of Representatives in such districts.
Vermont	Chapter 2, Sec. 39 If no candidate receives the major part of the votes, the Legislature chooses from the top three.

II.

The law in the following two states is unclear to us as to whether a plurality or majority vote is required to elect a Governor, although the State Legislature elects in the event there is a failure to elect by the people:

State	Constitutional Provision
Maine	Article 5, Sec. 3 If no candidate receives *a plurality of all the votes returned,* the House of Representatives chooses two from the top four, if there be that many, and transmits them to the Senate which chooses one of the two. *President of Senate can vote to break a tie vote in the Senate;* i. e., the President of the Senate can elect the Governor.
Rhode Island	Amendment X, Sec. 1 Amendment XI, Sec. 3 If no candidate gets a *plurality of the votes cast,* the Legislature chooses from the top two.

III.

The following thirty-six states provide for the election of Governor by plurality vote with the State Legislature electing in the event of a tie vote:

State	Constitutional Provision
Alabama	Article V, Sec. 115
Arkansas	Article VI, Sec. 3
Arizona	Article V, Sec. 1

State	Constitutional Provision
Colorado	Article IV, Sec. 3
Connecticut	Article IV, Secs. 3, 4
Delaware	Article III, Sec. 3
Idaho	Article IV, Sec. 2
Illinois	Article V, Sec. 4
Indiana	Article V, Secs. 4, 5
Iowa	Article IV, Secs. 3, 4
Kansas	Article I, Sec. 2
Louisiana	Article V, Sec. 2
Maryland	Article II, Secs. 2, 3, 4
Missouri	Article IV, Secs. 17, 18
Montana	Article VII, Sec. 2
Nebraska	Article IV, Sec. 4
New Hampshire	Part II, Article 42
New Jersey	Article V, Sec. 4
New Mexico	Article V, Sec. 2
Nevada	Article V, Sec. 5
North Carolina	Statutory Provision 163-99
North Dakota	Article III, Sec. 74
Ohio	Article III, Sec. 3
Oklahoma	Article VI, Sec. 5
Oregon	Article V, Secs. 4, 5
Pennsylvania	Article IV, Sec. 2
South Carolina	Article IV, Sec. 4
South Dakota	Article IV, Sec. 3
Tennessee	Article III, Sec. 2

State	Constitutional Provision
Texas	Article IV, Sec. 3
Utah	Article VII, Sec. 2
Virginia	Article V, Sec. 70
Washington	Article III, Sec. 4
West Virginia	Article VII, Sec. 3
Wisconsin	Article V, Sec. 3
Wyoming	Article IV, Sec. 3

IV.

The law is unclear in the following nine states as to how a Governor is to be chosen in the event of a tie vote or other failure to elect:

State	Constitutional or Statutory Provision
Alaska	Article III, Sec. 3
California	Article V, Sec. 4
Florida	Article IV, Sec. 2
Hawaii	Article IV, Sec. 1
Kentucky	Section 70. Governor is elected by plurality vote *with a tie to be determined by lot* in such manner as the Legislature may direct.
Massachusetts	Article XIV, Sec. 116
Michigan	Article V, Sec. 21 Vol. 5, Michigan Statutes Ann. Sec. 6-1061
Minnesota	Article V, Sec. 2
New York	Article IV, Sec. 1